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No. 99-195

In The

Supreme Court of the United States

A.B. CHANCE COMPANY,

Petitioner,

v.

JERRY ALLEN ENFIELD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Tenth Circuit's determination that the jury instructions in this personal injury case as a whole adequately reflected Kansas products liability law merits this Court's plenary review?

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STATEMENT OF THE CASE

Petitioner accurately sets forth the claims it made against the intervenor City of Goodland. However, Petitioner's statement of the case omits information important to placing Respondent's claims against Petitioner in the proper context.

At trial, Respondent presented overwhelming evidence to support his dual theories of negligence and strict product liability. Respondent demonstrated, *inter alia*, that Petitioner designed, manufactured and sold a digger-derrick with bolt specifications that had an inadequate margin of safety. The Petitioner manufactured a top-plate that was wavy instead of flat, in spite of the fact that Petitioner's own plans and specifications call for a flat top-plate. Nor did Petitioner's maintenance manual instruct purchasers on the type of replacement bolts and washers to be used in routine maintenance of the machine. Respondent presented evidence, which the jury credited, that Petitioner's design and manufacturing defects proximately caused Petitioner's digger-derrick to fail and injure Respondent.

REASONS FOR DENYING THE WRIT

The petition for a writ of *certiorari* should be denied for at least three independent reasons, each discussed more fully below. First, Petitioner failed to properly preserve any *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), issue in the courts below. Second, the state law premise for Petitioner's *Erie* argument – that the Tenth Circuit has incorrectly interpreted Kansas products liability law – is

lacking and, in any event, involves a determination of state law that does not merit this Court's attention. Finally, there is no circuit split on the question Petitioner presents. For these reasons, Respondent respectfully requests that this Court deny the petition for a writ of *certiorari*.

I. PETITIONER FAILED TO RAISE AND PROPERLY PRESERVE ANY *ERIE* ISSUE IN THE COURTS BELOW

Pursuant to this Court's Rule 15.2, Respondent brings to the Court's attention the fact that Petitioner did not properly raise and preserve any *Erie* claim in the courts below. Nor did the Tenth Circuit address such a claim anywhere in its opinion. *See* Pet. App. 7a (one paragraph addressing the challenged jury instruction with no mention or discussion of the *Erie* doctrine). With all due respect, those omissions alone should result in the denial of the petition for a writ of *certiorari*. Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice*, at 370 (7th ed. 1993).

Petitioner completely failed to raise any *Erie* issue in the District Court at any point in the proceedings. Although Petitioner had every opportunity in the District Court to request certification of the Kansas products liability law issue to the Kansas Supreme Court, Petitioner failed to do so. Thus, despite knowledge that the federal District Courts in Kansas were relying upon and using the products liability jury instruction that the Tenth Circuit approved in *Wheeler v. John Deere Co.*, 862 F.2d 1404 (10th Cir. 1988), Petitioner apparently made a deliberate

choice not to raise an *Erie* objection prior to, during, or even immediately after the trial. Thus, Petitioner waived any *Erie* issue.

In its opening brief in the Tenth Circuit, as well as its reply brief, Petitioner neither mentioned the *Erie* doctrine or even cited the *Erie* case. Rather, Petitioner made three primary arguments in the Tenth Circuit: (1) the district judge erred in admitting certain evidence, including evidence of other accidents involving Petitioner's product; (2) the district judge erred in excluding evidence of the intervenor City's subsequent use of Petitioner's product; and (3) the district judge erred in giving two instructions (one being the instruction at issue in this petition) and in not giving a third. Only one of the asserted instructional errors is relevant to the question Petitioner now purports to present to this Court but, again, Petitioner did not challenge that instruction in the Tenth Circuit as a potential *Erie* problem.[1]

Not until it filed its unsuccessful motion for rehearing in the Tenth Circuit, after that Court had issued its decision in this case, did Petitioner even cite *Erie* in one of its filings. That is simply too late to preserve the issue for this Court's review.

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[1] At the same time it filed its opening brief in the Tenth Circuit, Petitioner did file a motion to certify to the Kansas Supreme Court the issue whether, under Kansas law, "it is proper to instruct a jury that a manufacturer has a 'strict duty of care' in either a strict liability or negligence action?" The motion, like Petitioner's Tenth Circuit brief, neither cited *Erie* nor raised an *Erie* argument. Moreover, Petitioner never made such a motion in the District Court but, instead, waited until it filed its opening brief on appeal.

II. THE TENTH CIRCUIT'S INTERPRETATION OF KANSAS PRODUCTS LIABILITY LAW IS CORRECT AND, IN ANY EVENT, RAISES ONLY A STATE LAW QUESTION THAT DOES NOT MERIT THIS COURT'S REVIEW

A. The Tenth Circuit Correctly Interpreted Kansas Law

The basic premise of Petitioner's petition, that the Tenth Circuit created and then followed a new rule under Kansas product liability law, does not exist because the challenged jury instruction accurately stated Kansas products liability law.

Kansas has adopted the strict liability doctrine set forth in Restatement (Second) of Torts § 402A (1964), and its accompanying comments. *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 630, 886 P.2d 869, 886 (1994) (citing *Brooks v. Dietz*, 218 Kan. 698, 545 P.2d 1104, 1108 (1976)). The Kansas pattern jury instruction on strict liability, which the Kansas Supreme Court has approved, *see id.*, and which the district court gave in this case, tracks the language of the Restatement. That pattern instruction provides as follows:

> A manufacturer who sells a product in a defective condition which is unreasonably dangerous to the user is subject to liability for physical harm thereby caused to the ultimate user, if:
>
> (1) The manufacturer is in the business of making such a product; and
>
> (2) It is expected that the product will reach and does reach the user without substantial change in the condition in which it was sold.

> The rule applies although the manufacturer has exercised all possible care in the preparation and sale of the product and although the user has not bought the property from or entered into any contractual relation with the seller.
>
> A product is in a defective condition if it has defects in design, manufacturing, or instructions, and such defects existed at the time the product left the manufacturer's hands.
>
> A defective condition is unreasonably dangerous if it is dangerous when used in the way it is ordinarily used considering the product's characteristics and common usage, and is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics.

Pattern Instructions Kansas-Civil § 128.17 (3d ed. 1997).

Thus, under Kansas law, a manufacturer may be held liable for injuries its product causes even though the manufacturer exercised all possible care, even the highest possible care, in the design and manufacture of the product. In this sense, the manufacturer's duty with respect to design and manufacture is a strict duty because it does not matter whether the manufacturer was negligent in the design and manufacture of its product. Further, negligence in the use of the product does not absolve the manufacturer, so long as the negligent use was foreseeable. *Albertson v. Volkswagenwerk Aktiengesellschaft*, 230 Kan. 368, 373, 634 P.2d 1127, 1131 (1981); *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 768, 798 (1980). The Tenth Circuit followed that rule of Kansas products liability law in *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1412,

n. 6 (10th Cir. 1988) (recognizing that, under Kansas law, a manufacturer may still be liable for a user's foreseeable misuse of the product).

The concept of "misuse" may include the user's negligence. The focus under Kansas law is that the product was sold in a defective condition which was unreasonably dangerous to the user, that the manufacturer was in the business of making such a product, and that the manufacturer expected the product to, and it did, reach the user without substantial change in the condition in which it was sold. Respondent's overwhelming evidence at trial more than satisfied each of these elements.

Ultimately, the jury instruction about which Petitioner now complains, in particular the language that "a manufacturer has a strict duty of care in design and production, including the duty to guard against injury to ordinary and even negligent consumers," is a correct statement of the well-established Kansas products liability law principle that a manufacturer may be held liable for injuries caused by a defective and unreasonably dangerous product, even though the manufacturer may have exercised all possible care in design and manufacture.

The Tenth Circuit has not blindly followed predictive precedent. Petitioner claims that, in *Wheeler*, the Tenth Circuit announced that "strict duty of care" dicta from *Prince v. Leesona Corp.*, 720 F.2d 1166 (10th Cir. 1983), appeared to be a close enough approximation of Kansas law, at least "until the Kansas Courts tell us otherwise." Petition at 11. But Petitioner quotes *Wheeler* out of context. In truth, before approving the language Petitioner

now challenges, the *Wheeler* court first reviewed Kansas tort law as it applied to the instruction at issue. After noting that Kansas has incorporated concepts of fault into its strict product liability law, and after observing that before fault can be apportioned it is necessary to define the respective duties of the parties, the court stated "[t]hus, until the Kansas courts tell us otherwise, we cannot conclude that an instruction attempting to define those duties in strict liability is error." 862 F.2d at 1412-13.

The Tenth Circuit did not say that the duty described in the instruction that Petitioner belatedly challenges was the law until the Kansas courts indicate otherwise. Rather, it was simply recognizing that, until the Kansas courts indicated that an instruction pertaining to the duties of the parties was unnecessary in a strict liability case, it would not criticize federal district courts in Kansas for attempting to define those duties in diversity cases.

Further, the *Wheeler* court did not blindly approve the use or the content of the *Prince* footnote as an instruction. Indeed, the Tenth Circuit's only criticism of the instruction in *Wheeler* had to do with the assignment of a lower duty of care to the consumer than to the manufacturer. As part of its review of Kansas law, the *Wheeler* court noted that "because Kansas courts have not described the differing legal duties involved in strict product liability actions as comparatively 'lower' or 'higher,' on remand the district court should simply define the actors' respective duties without stating that the duties differ in degree." *Wheeler*, 862 F.2d at 1413, n. 6.

In this case, the district court followed *Wheeler* and omitted any reference to the actors' differing duties. Thus, contrary to Petitioner's claim, the history of this instruction shows that the Tenth Circuit has not blindly followed prior predictive opinions. Instead, in each case the Tenth Circuit has carefully reviewed Kansas products liability law and the jury instructions given in light of the particular facts of the case to ensure that the jury was given accurate guidance. The Tenth Circuit did the same in this case, reviewing its own prior decisions and then analyzing the instructions as a whole.

Not only was the Tenth Circuit's ultimate determination in this case correct, but its case-specific determination that the jury instructions as a whole accurately stated Kansas products liability law does not merit this Court's attention.

B. The Jury Instructions Accurately Stated Kansas Law

In the Tenth Circuit, Petitioner improperly asked the court to focus on a single phrase in a single jury instruction in a circumstance where the court was required to view the instructions as a whole. *California v. Brown*, 479 U.S. 538 (1987); *see also Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 552 (10th Cir. 1999). The Tenth Circuit rejected this common appellate ploy, properly reviewed the jury instructions as a whole,[2] and found that the instructions

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[2] Before considering any of Petitioner's challenges to the jury instructions, the Tenth Circuit declared that "[w]e review *de novo* whether the district court's instructions, considered as a

accurately reflected Kansas law. Petitioner now invites this Court to engage in precisely the same kind of review that the Tenth Circuit properly declined.

Even a brief review of the instructions as a whole demonstrates that the jury was properly advised of the relevant Kansas law and was not misled in any way. Importantly, Respondent presented ample evidence that the digger-derrick Petitioner manufactured was defective and unreasonably dangerous. Petitioner does not and cannot contend otherwise. The case was submitted to the jury under both negligence and strict product liability theories. Respondent presented proof that the product was defective in both design and manufacture and that Petitioner failed to provide appropriate instructions on the use and maintenance of the product.

The sources of the instructions the district court gave were the Kansas Pattern Instructions 3d and instructions from previous cases that had been approved on appeal. Instruction 11 advised the jury that failure of a manufacturer to use ordinary care in the design of its product constitutes negligence. Instruction 12 stated that the manufacturer has a duty to reasonably inspect the manufactured product for any defects and that failure to do so is negligence. Instruction 13 explained that there is a duty to make such tests for defects as are reasonably necessary to assure safety of the product and that failure to do so constitutes negligence. The jury was then given Kansas Pattern Instruction, PIK 3d § 128.17 (quoted above),

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whole, properly stated the applicable law and focused the jury on the relevant inquiry." Pet. App. 7a.[3]

which advised the jury that Respondent was entitled to recover under a strict products liability theory only if the evidence demonstrated each of the five elements required for recovery set forth in the Restatement (Second) of Torts § 402A. All of these instructions correctly stated Kansas law and correctly instructed the jury on the theories presented.

Because instructions 11 through 13 specifically referred to negligence, it was incumbent upon the court to instruct the jury with respect to Petitioner's duty in the context of the strict liability claim. Under Kansas comparative fault principles, the failure to so define Petitioner's duty would arguably have been error. Instruction 16 simply advised the jury that Petitioner has a duty derived from strict liability to design and manufacture products that are not unreasonably dangerous to end users. The Tenth Circuit correctly concluded that this instruction, when reviewed in the context of the entire case and with all of the other instructions, adequately reflected Kansas law. Pet. App. 7a ("In light of this court's previous holdings and after analyzing the instruction[s] as a whole, we find that this instruction adequately reflects Kansas law").

Petitioner's conclusion that the phrase "strict duty of care" equates to "absolute liability" and transforms Petitioner into Respondent's personal insurer is erroneous. Petitioner provides no citation of authority for its conclusion that a single phrase in one instruction imposed absolute liability equal to that of an insurer. Nor does Petitioner define what it means by this mythical standard. Without definition it must be assumed that Petitioner means that the phrase allegedly imposed liability without

fault. *Jones v. Hittle Service*, Inc., 219 Kan. 627, 549 P.2d 1383, 1388 (1976). However, the instruction Petitioner now attacks concludes by informing the jury that it must decide the case on the basis of comparative fault.[3]

III. THERE IS NO CIRCUIT SPLIT ON THE *ERIE* DOCTRINE

Petitioner incorrectly asserts that there is a split in the circuits on the *Erie* doctrine. First, Petitioner's argument, as the Petition makes clear at pages 17-19, is premised on the erroneous proposition that the Tenth Circuit has incorrectly interpreted Kansas products liability law. In order to even reach the contention that a circuit split exists, this Court would first have to decide that pure question of state law in Petitioner's favor. With all due respect, the correct interpretation of Kansas products liability law is not an issue that merits this Court's plenary review.

In any event, Petitioner's alleged Circuit split is nothing more than a game of semantics. Putting aside this Court's decision in *Salve Regina College v. Russell*, 499 U.S.

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[3] Moreover, Petitioner's argument that a single phrase in a single jury instruction has the effect of charging Petitioner with absolute liability does not comport with the manner in which instructions are reviewed under Kansas law. The Kansas Supreme Court has declared that "[i]nstructions in any particular action are to be considered together and read as a whole, and where they fairly instruct the jury on the law governing the case, error in an isolated instruction may be disregarded as harmless. If the instructions are substantially correct, and the jury could not reasonably be misled by them, the instructions will be approved on appeal." *Trout v. Koss Constr. Co.*, 240 Kan. 86, 88-89, 727 P.2d 450 (1986).

225 (1991), which has nothing to do with the issue Petitioner purports to present here,[4] Petitioner's alleged conflict boils down to mere differences in words the Circuits use to describe their application of *stare decisis* principles when interpreting state law.

A common sense reading of the various decisions Petitioner cites demonstrates that there is no practical difference between the Circuits' approaches to *stare decisis* in the context of interpreting state law. There simply is no meaningful difference between a Circuit declaring that *stare decisis* requires it to follow its own prior decisions predicting state law unless intervening state cases tend "to cast doubt" on Circuit precedent (Second Circuit), and a Circuit instead phrasing the inquiry as whether there is "persuasive evidence" of a change in state law (Third Circuit), a "clearly contrary subsequent holding of the highest court of the state" (Fifth Circuit), "an indication" of a change in state law (Sixth Circuit), or "intervening

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[4] In *Salve Regina College v. Russell*, 499 U.S. 225 (1991), the sole question was whether the Courts of Appeal should apply *de novo* review or, instead, some sort of deferential review to district court decisions interpreting state law in diversity cases. There was no issue of *stare decisis*, *i.e.*, whether a Court of Appeals should follow its own prior decisions interpreting state law. Ultimately, this Court held that a *de novo* standard of review is appropriate when the Courts of Appeal review any legal question, whether based on federal or state law. Even so, this Court did not purport to alter or undermine its own traditional practice of not expending its limited resources engaging in determinations of state law. *Id.* at 235 n. 3 ("We are not persuaded that the manner in which this Court chooses to expend its limited resources in the exercise of its discretionary jurisdiction has any relevance to the obligation of courts of appeals to review *de novo* those legal issues properly before them").

controlling authority" from the state courts (Ninth Circuit). The terms various Circuits use in describing the applicable and identical *stare decisis* principles are simply semantic differences, with no substantive or logical difference in their effect.

Ultimately, Petitioner's complaint distills to the sole proposition that the Tenth Circuit incorrectly interpreted Kansas products liability law on an issue that the Kansas courts have not yet fully and explicitly addressed and resolved. That proposition does not merit this Court's attention.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of *certiorari*.

Respectfully submitted,

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